DIVISIONS III, IV, I

CA06-158

DECEMBER 6, 2006

ECONOMY INN & SUITES & CCMSI	APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
APPELLANTS	
v.	[F304985]
NIMISHA JIVAN	
APPELLEE	AFFIRMED

Karen R. Baker, Judge

Appellant employer Economy Inn & Suites and its insurance carrier appellant CCMSI appeal the Workers' Compensation Commission's decision awarding appellee Nimisha Jivan (deceased) benefits alleging that the Commission erred when it ruled that the deceased was performing employment services at the time of the accident. We find no error and affirm.

The case was submitted on stipulated facts that included the following:

. . .

3. Nimisha Jivan was employed as the assistant manager for the respondent employer on February 17, 2003 and in this capacity she and her husband, who was the hotel manager, were provided with a room in the hotel to live on the premises to carry out their responsibilities as employees of the hotel.

4. On February 17, 2003 Mrs. Jivan was off duty and was in the bathroom of the hotel room provided by the respondent changing her clothes to go to a gym to exercise when a fire occurred at the hotel and Mrs. Jivan was not able to escape the fire and died as a result of smoke inhalation.

5. Although Mrs. Jivan was off duty at the time her death occurred, the parties agreed and stipulate that she and her husband were always considered to be on-call to address any hotel related issues, which is at least one of the reasons she and her

husband were provided a room in the hotel there on the premises.

The critical issue in this case is whether Ms. Jivan was performing "employment services" at the time of her injury. As our supreme court noted in *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002), Act 796 of 1993 made significant changes in the workers' compensation statutes and in the way workers' compensation claims are to be resolved. *Pifer,* 347 Ark. at 856, 69 S.W.3d 1 (citing *White v. Georgia-Pacific Corp.,* 339 Ark. 474, 6 S.W.3d 98 (1999)). Claims arising from injuries occurring before the effective date of Act 796 (July 1, 1993) were evaluated under a liberal approach. *See Eddington v. City Elec. Co.,* 237 Ark. 804, 376 S.W.2d 550 (1964); Ark. Stat. Ann. § 81-1325(b)(4) (Supp.1979). However, Act 796 requires us to strictly construe the workers' compensation statutes. Ark. Code. Ann. § 11-9-704(c)(3 year); *Georgia-Pacific Corp*., *supra.* The doctrine of strict construction directs us to use the plain meaning of the statutory language. *Pifer*, *supra.*

Act 796 defines a compensable injury as "[a]n accidental injury ··· arising out of and in the course of employment...." Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed...." Ark. Code Ann. § 11-9-102(4)(B)(iii). However, Act 796 does not define the phrase "in the course of employment" or the term "employment services." *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). It therefore falls to this court to define these terms in a manner that neither broadens nor narrows the scope Act 796 of 1993. *Pifer,* 347 Ark. at 856, 69 S.W.3d at 1.

Since 1993, it has been held several times that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer...." *Pifer,* 347 Ark. at 857, 69 S.W.3d at 1; *Collins v. Excel Specialty Prods.,* 347 Ark. 811, 816, 69

S.W.3d 14, 18 (2002); *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100; *Olsten Kimberly,* 328 Ark. 381, 384, 944 S.W.2d 524, 526 (1997). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *Pifer*, *supra*; *White v. Georgia-Pacific Corp*., *supra*; *Olsten Kimberley*, *supra*. The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100. *See also Wal-Mart Stores, Inc. v. King,* --- Ark. App. ----, ---S.W.3d ---- (Nov. 9, 2005); *Ark. Meth. Hos. v. Hampton*, ---Ark. App. ----, --- S.W.3d ---- (Mar. 23, 2005). The critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Collins*, 347 Ark. at 818, 69 S.W.3d 14; *see also Matlock v. Ark. Blue Cross Blue Shield,* 74 Ark. App. 322, 49 S.W.3d 126 (2001).

Thus, the issue now before us is whether there is substantial evidence to support the Commission's finding that the injuries and resultant death of Ms. Jivan arose out of and in the course of her employment. A claimant seeking benefits must prove by a preponderance of the evidence that the injury arose out of and in the course of the employment. *Ark. Dep't of Correction v. Glover,* 35 Ark. App. 32, 812 S.W.2d 692 (1991). "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred. *Jones v. City of Imboden*, 39 Ark. App. 19, 832 S.W.2d 866 (1992); *Gerber Products v. McDonald*, 15 Ark.. App. 226, 691 S.W.2d 879 (1985).

The Commission found that Ms. Jivan was on the employer's premises at the time of her injury and was expected to reside on the premises for the employer's convenience. It further found that the employer's purpose and interest were advanced by Ms. Jivan's frequent and regular

presence on the premises. The Commission therefore concluded that Ms. Jivan was within the space boundaries of her employment. Given that Ms. Jivan was on-call twenty-four hours a day, it also found that she was within the time boundaries of her employment as well. In reaching its decision, the Commission distinguished the facts of this case from that of *Cook v. ABF Freight Systems,* 88 Ark. App. 86, 194 S.W.3d 794 (2004) in which the employee was injured in a private motel neither owned nor affiliated with the employer. In *Cook*, there was no indication that the employee was required to stay at this hotel, or that his staying in that hotel advanced his employer's interest, rather, the room was provided solely for the employee's convenience.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Kimberly Quality Care v. Pettey*, *supra.* The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo. CDI Contractors v. McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *White v. Georgia-Pacific Corp*, *supra.*

In this case, we are not convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. The concept of employment services encompasses the performance of incidental activities that are inherently necessary for the

performance of the primary activity. *Privett v. Excel Specialty Prod.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002). The Commission reasoned that given Ms. Jivan's responsibilities to her employer, her residing on the premises and spending as much time as possible on the premises was inherently necessary for the performance of her primary activity, managing the hotel. An employee is performing employment services when her injury is sustained within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Pifer*, *supra*. Accordingly, we find that substantial evidence supports the Commission's decision and affirm.

Affirmed.

GLOVER, NEAL, VAUGHT and ROAF, JJ., agree.

PITTMAN, CJ., HART, GLADWIN and BIRD, JJ., dissent.

Sam Bird, Judge, dissenting. I respectfully disagree with the majority that substantial evidence supports the Commission's conclusion that Nimisha Jivan was performing employment services at the time of her death. While apparently recognizing that, under Ark. Code Ann. § 11-9-102(4)(B)(iii), a compensable injury does not include injuries suffered at a time when employment services were not being performed, the majority, nonetheless, affirms a grant of workers' compensation benefits to the estate of a decedent who, by stipulation of the parties, was not only off duty at the time of her death but was doing nothing more than changing her clothes in the bathroom of her living quarters at a hotel in preparation for leaving the premises to go to a gym to exercise.

Under the current state of our law, an employee is considered to be performing employment services when he or she is doing something that is generally

required by his or her employer. *Moncus v. Billingsley Logging & Am. Ins. Co.*, ___ Ark. ___, ___ S.W.3d ___ (May 18, 2006). The same test is used to determine whether an employee was acting in the course of employment as is used in determining whether the employee was performing employment services. The test is simply whether the injury occurred within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interest either directly or indirectly. *Id*.

Here, based solely upon findings that "[Economy Inn's] purpose and interest was advanced by [Jivan's] frequent and regular presence on the premises" and that Jivan was "on call" twenty-four hours a day, the Commission concluded that Jivan's estate had proven by a preponderance of the evidence that Jivan was engaged in employment services at the time of her fatal injury. The majority's position, which affirms the Commission, seems to be that if an employer provides a twenty-four-hour, on-call employee with living quarters where it is more convenient for the employee to respond to a call, any injury occurring on the premises of the living quarters so provided is subject to workers' compensation compensability. This position is flawed. The fact that Jivan, while on call, was frequently and regularly present in living quarters provided to her on the premises of the hotel where she worked does not necessitate a finding that every activity in which she engaged was inherently necessary to her job. Jivan was certainly entitled to enjoy life in her home at the hotel beyond her responsibilities as the hotel's assistant manager. There was no evidence that she was required to remain on the premises at all times, or even most of the time, for the benefit of her employer, and the

fact that, while off duty, she was changing clothes in the bathroom to go exercise at a gym could not possibly have been "inherently necessary" to the performance of her job as the assistant hotel manager. If that were the case, employers would be required to extend workers' compensation coverage to every personal activity in which an employee such as Jivan might have engaged while in her room at the hotel, including cooking, eating, washing dishes, watching television, dancing, sleeping, or falling out of bed.

The majority cites a host of cases for the well-established proposition that an employee is performing employment services when doing something that is generally required by the employer, and for the equally-well-established proposition that the test of compensability is whether an employee is injured within the time and space boundaries of employment, when the employee is carrying out the employer's purpose or advancing the employer's interest directly or indirectly. However, the majority cites no authority, in any form or from any jurisdiction, that explains how an employee, who is off duty and changing her clothes in the privacy of her bathroom so that she can go to a gym and exercise, falls within the criteria of the cases it cites.[1] The majority certainly cites no cases

---

[1] Without saying so, the majority apparently relies upon the "increased risk doctrine" discussed in *Deffenbaugh Industries v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). In *Deffenbaugh,* the supreme court held that an employee who lived in an employer-provided mobile home as a condition of his employment was in the course of employment when he was injured as a result of a tornado striking the mobile home while he was having dinner with his family. The parties in *Deffenbaugh* stipulated that the employee's duties of employment were required to be performed as needed, twenty-four hours a day, seven days a week, and proof showed that the employee was, when the tornado struck, awaiting the scheduled arrival of a truck relating to his employer's business.

In contrast to *Deffenbaugh*, here the parties stipulated that Jivan was off duty at the time of her injuries, and there were no stipulations that she was required to live at the motel as a

for the proposition that employees injured at home while subject to twenty-four-hour call by their employer are entitled to workers' compensation benefits simply because they are on call. Moreover, the majority cites no authority supporting the proposition that it makes a difference where, for the employer's convenience, the employer provides the employee's residence. Rather, the majority concludes, without reference to any evidence supporting the Commission's decision, that because the Commission found Jivan's injuries and death to be compensable, then it must be so.

Contrary to the majority's conclusion, we have held that an injury is not compensable where an employee is performing an activity that is merely for the purpose of attending to his personal needs or where the activity is not inherently necessary for the performance of the job. *See Cook v. ABF Freight Sys., Inc*., 88 Ark. App. 86, 194 S.W.3d 794 (2004) (holding that claimant, a truck driver who was "off the clock" but "on-call" in a motel room provided by his employer and was injured while turning on a light switch in the bathroom, was not performing employment services where there was no evidence that his entry into the bathroom was for any other reason other than to attend to his own personal needs); *see also Kinnebrew v. Little John's Truck, Inc*., 66 Ark. App. 90, 989 S.W.2d 541 (1999) (holding that claimant, a truck driver who showered at a truck stop while he was off-duty but on the road and awaiting further instructions from his dispatcher, was not performing employment services because showering was not "inherently necessary" for the performance of the job that he was hired to do).

---

condition of her employment or be present in the motel at all times.

I am convinced that fair-minded persons with the same facts before them could not have reached the conclusion that Jivan was performing employment services at the time of her death. Jivan was off-duty and was not engaged in any employment activities at the time her death occurred: by changing her clothes in the bathroom so that she could go to a gym and exercise, she was doing nothing that was generally required by her employer or to carry out her employer's purpose. Economy Inn could not possibly have gleaned any benefit from Jivan's changing clothes in the bathroom. Furthermore, changing clothes in the bathroom in preparation to go to a gym and exercise was not inherently necessary for the performance of her job and was merely of personal benefit to Jivan. For these reasons, I would reverse the Commission's decision in this case.

PITTMAN, C.J., and HART and GLADWIN, JJ., join.